OCBC Bank (M) Bhd v Equal Ace (M) Sdn Bhd & Anor

HIGH COURT (MUAR) — ORIGINATING SUMMONS NO 24(HT) 102 OF 2008
UMI KALTHUM JC
26 MAY 2010

Land Law — Charge — Order for sale — Cause to contrary — Whether occupation of land by chargor constituted cause to contrary — Whether cause to contrary established merely because lender arrogant, boorish or unmannerly

Land Law — Sale of land — Order for — Charge action to recover sums due — 1/2 share in land transferred to second defendant under court order subject to plaintiff's charge — Application by plaintiff for order for sale — Whether order for sale may be granted over second defendant's portion of land

Land Law — Transfer — Registration — Share in land transferred subject to charge — 1/2 share in land transferred to second defendant under court order subject to plaintiff's charge — Application by plaintiff for order for sale — Whether charge enforceable against second defendant — National Land Code ss 215 & 216

The first defendant was the owner of the whole undivided share of a piece of land ('the said land') which was charged to the plaintiff vide four different charges pursuant to s 256 of the National Land Code ('NLC') as security for loans granted by the plaintiff to the first defendant. The second defendant had instituted an action against the first defendant praying for, inter alia, a declaration that the 1/2 share of the said land purportedly transferred by the second defendant to the first defendant was obtained through fraud. The Court of Appeal had ordered the said 1/2 share to be retransferred to the second defendant without prejudice to the plaintiff's interests as chargee over the said land. Subsequently, in breach of the terms of the charge, the first defendant had allowed itself to be wound up. Hence this application by the plaintiff for an order for sale of the said land. The second defendant claimed that he had obtained indefeasible title under s 340 of the NLC and that it was possible to apply for the sale of the whole undivided share of the first defendant's without affecting the second defendant's share. It was also submitted that there had never been a relationship of chargee/chargor between the plaintiff and the second defendant to found a charge action.

Held, allowing the plaintiff's application with no order as to costs:

(1) The plaintiff's charges remained unaffected by the transfer of the share

of the said land to the second defendant. The provisions of ss 215(3)(a) and 216 of the NLC applied to the second defendant and thus binding the second defendant to the said charges in favour of the plaintiff and enforceable by the plaintiff against the second defendant. This was so even though there was no relationship between the plaintiff and the second defendant prior to the Court of Appeal's order (see para 15(a)).

(2) By virtue of s 216 of the NLC, every provision of the charges were enforceable against the second defendant as if the second defendant was a party to the charges and had stepped into the shoes of the first defendant in regard to second defendant's share of the said land. The plaintiff was entitled to demand for the sum owing not only from the first defendant, but also the second defendant and to issue the Form 16D to both of them as if the second defendant had failed to make good the sums secured under the charges (see para 15(c)).

(3) Whether the relatives of the second defendant were still occupying the second defendant's share of the said land did not constitute 'cause to the contrary'. The phrase 'cause to the contrary' cannot extend to enabling the court to refuse relief simply because it feels sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly (see para 15(f)).

[Bahasa Malaysia summary
Defendan pertama adalah tuan punya sebidang tanah ('tanah tersebut') yang telah digadaikan kepada plaintif melalui empat gadaian yang berbeza di bawah s 256 Kanun Tanah Negara ('KTN') sebagai cagaran untuk pinjaman-pinjaman yang diberikan oleh plaintif kepada defendan pertama. Defendan kedua telah memulakan tindakan terhadap defendan pertama memohon, antara lain, pengisytiharan bahawa 1/2 bahagian tanah tersebut yang dikatakan dipindah milik oleh defendan kedua kepada defendan pertama telah diperolehi secara fraud. Mahkamah Rayuan telah memerintahkan agar 1/2 bahagian tersebut dipindah milik semula kepada defendan kedua tanpa memprejudis kepentingan plaintif sebagai pemegang gadaian terhadap tanah tersebut. Kemudiannya, dalam kemungkiran syarat-syarat gadaian, defendan pertama telah membenarkan dirinya digulungkan. Maka permohonan ini difailkan oleh plaintif bagi satu perintah penjualan tanah tersebut. Defendan kedua mendakwa bahawa dia telah memperoleh hak milik tak boleh sangkal di bawah s 340 KTN dan adalah mungkin untuk memohon penjualan keseluruhan bahagian yang tidak dibahagi defendan pertama tanpa menjejaskan bahagian defendan kedua. Ia juga dihujahkan bahawa tidak pernah wujud hubungan pemegang gadaian/penggadai antara plaintif dan defendan kedua untuk menjadi asas tindakan gadaian ini

Diputuskan, membenarkan permohonan plaintif tanpa perintah untuk kos:

(1) Gadaian-gadaian plaintif kekal tidak dipengaruhi oleh pemindahan

bahagian tanah tersebut kepada defendan kedua. Peruntukan-peruntukan ss 215(3)(a) dan 216 KTN adalah terpakai ke atas defendan kedua dan dengan demikian mengikat defendan kedua kepada gadaian-gadaian tersebut dan boleh dikuatkuasakan oleh plaintif terhadap defendan kedua. Ini adalah benar walaupun tidak ada hubungan antara plaintif dan defendan kedua sebelum perintah Mahkamah Rayuan (lihat perenggan 15(a)).

(2) Menurut s 216 KTN, setiap peruntukan gadaian-gadaian tersebut boleh dikuatkuasakan terhadap defendan kedua seolah-olah defendan kedua merupakan pihak bagi gadaian-gadaian tersebut dan mempunyai kedudukan yang sama dengan defendan pertama berkaitan dengan bahagian tanah defendan kedua tersebut. Plaintif berhak menuntut untuk jumlah terhutang bukan sahaja dari defendan pertama, tetapi juga daripada defendan kedua dan mengeluarkan Borang 16D terhadap mereka berdua seolah-olah defendan kedua telah gagal untuk membayar jumlah yang dijamin di bawah gadaian-gadaian tersebut (lihat perenggan 15(c)).

(3) Sama ada saudara-mara defendan kedua masih menduduki bahagian tanah defendan kedua tersebut tidak membawa kepada 'sebab bertentangan'. Frasa 'sebab bertentangan' tidak boleh dilanjutkan bagi membolehkan mahkamah tidak memberikan relief hanya kerana ia berasa kasihan terhadap peminjam atau kerana ia menganggap pemberi pinjaman sebagai sombong, biadab atau kurang ajar (lihat perenggan 15(f)).]

Notes

For cases on order for sale, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2376–2520.

For cases on order for sale of land, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4295–4397.

For cases on registration, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4820–4828.

Cases referred to

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457, PC (refd)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77, FC (refd)

Sri Alam Sdn Bhd v Newacres Sdn Bhd [1997] 1 MLJ 297; [1997] 3 CLJ 640, CA (refd)

Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (distd)

Legislation referred to

National Land Code ss 215, 215(3)(a), 216, 256, 256(3), 270, 340, 340(2), (3), Forms 14D, 16D

Tan Chee Giap (Soh Yok Lam & Co) for the plaintiff.
GF Nelson (GF Nelson) for the defendants.

Umi Kalthum JC:

THE APPLICATION

[1] The plaintiff had applied in encl 2 for an order for sale of the land held under Geran 84935 (formerly CT No 265) Lot No 3073 Bandar Maharani, District of Muar ('the said land') which was charged to the plaintiff vide Presentation Nos 1642/1995 Jilid 3182 Folio 34, 1643/1995 Jilid 3182 Folio 35, 26724/1995 Jilid 3267 Folio 59 and 26725/1995 Jilid 3267 Folio 60 pursuant to s 256 of the National Land Code ('NLC').

BRIEF FACTS

[2] The first defendant was the owner of the whole undivided share of the said land. Through the four said charges, the first defendant had charged the said land in favour of the plaintiff as security for loans granted by the plaintiff to the first defendant, including interests. The loans comprise of the term loan under Account No 711–403287, the overdraft loan under Account No 711–108145–6 and the omnibus tradeline loan.

[3] The second defendant (with another) had instituted an action against the first defendant, the plaintiff and one other person in Civil Action No 22–43 of 1995 in this court praying for several declarations, in particular that the 1/2 share of the said land purportedly transferred by the second defendant to the first defendant was obtained through fraud, and for the 1/2 share of the said land to be transferred back to the second defendant. The learned High Court judge dismissed the second defendant's action, whereupon the second defendant appealed to the Court of Appeal, Civil Appeal No J-02–529 of 1999. When the second defendant's appeal was called up for hearing before the Court of Appeal, and as explained by the plaintiff's counsel then in the 'afidavit jawapan ketiga plaintif' (encl 35), the second defendant's counsel, in the absence of the first defendant's representative or counsel, had requested for the transfer of the 1/2 share in the said land from the first defendant to the second defendant 'tanpa menjejaskan dan memprejudiskan dan tertakluk kepada kepentingan responden ketiga (that is the plaintiff) selaku pemegang gadaian ke atas tanah yang berkenaan'. As the plaintiff's interests as chargee over the said land would not be affected or prejudiced, the plaintiff had

agreed to the request. Thus it came about that the Court of Appeal made the order (exh 'NAAR-12', afidavit sokongan, encl 3) dated 10 June 2003 ('the Court of Appeal's order') as follows:

> ADALAH DENGAN INI DIPERINTAHKAN bahawa dengan persetujuan Responden Ketiga (ie the Plaintiff) bahawa Responden Kedua (ie the First Defendant) hendaklah memindah milik bahagian tanah yang tidak dibahagikan, kepada Perayu Pertama (ie Second Defendant) di dalam ini dalam tempoh masa tiga (3) bulan dari tarikh penyerahan perintah ini, setengah bahagian (1/2) syer di dalam tanah yang dipegang di bawah Certificate of Title (CT) No. 265. Lot 3073 Mukim Bandar Maharani, Muar yang pada masa ini didaftarkan di atas nama Responden Kedua dan di mana kegagalan Responden Kedua berbuat demikian maka Timbalan Pendaftar dan atau Penolong Kanan Pendaftar hendaklah melaksanakan pindah milik setengah (1/2) bahagian tanah yang berkenaan di atas kepada Perayu Pertama di dalam ini tanpa menjejaskan dan memprejudiskan dan tertakluk kepada kepentingan Responden Ketiga selaku Pemegang gadaian ke atas tanah yang berkenaan ...

[4] Pursuant to the said Court of Appeal's order, the second defendant was registered as the registered owner of 1/2 share of the said land (exh 'NAAR-13', encl 3).

[5] In breach of the terms and conditions of the memorandum of charge, the first defendant had allowed itself to be wound up vide the High Court Kuala Lumpur's order dated 13 March 1998 (exh 'NAAR-14', encl 3). Hence this application by the plaintiff was filed not only against the first defendant but also the second defendant in respect of the four charges registered in the plaintiff's favour over the whole undivided share of the said land.

THE LAW

[6] Section 256 of the NLC provides for the application to court for an order for sale. It is as follows:

> (1) This section applies to land held under —
>
> (a) Registry title;
>
> (b) the form of qualified title corresponding to Registry title; or
>
> (c) subsidiary title,
>
> *and to the whole of any undivided share in*, or any lease of, *any such land*.
>
> (2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.

(3) On such application, the Court shall order the sale of the land or lease to which the charge relates *unless it is satisfied of the existence of cause to the contrary*.

(Emphasis added.)

It is therefore incumbent on the second defendant to prove that there is in 'existence cause to the contrary' in order for this court to exercise its powers under s 256(3) to disallow the plaintiff's application for an order for sale of the said land.

[7] In the Federal Court case of *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 it was held that:

(1) 'Cause to the contrary' within section 256(3) of the Code might be established only in three categories of cases:

(i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s 340 of the Code;

(ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and

(iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity. If no cause to the contrary could be shown, the court would be obliged to make an order for sale.

THE PLAINTIFF'S CASE

[8] It was submitted for the plaintiff that the second defendant had not shown any cause to the contrary. That it was clear vide the Court of Appeal's order, the transfer of 1/2 share in the said land from the first defendant to the second defendant was 'not to affect adversely and prejudice and subject to the plaintiff's interest as the chargee of the said land'. This can be seen in the title deed in exh 'NAAR 13', encl 3, where despite the first and second defendants are registered owners of 1/2 share each in the said land, the charges to the plaintiff are still undisturbed, that is, in respect of the whole and not part of the said land.

[9] References was made to s 215(3)(a) to the NCL where it is provided that:

(3) The transferee of any alienated land *shall hold the same subject to* —

(a) *any* lease, *charge* or other registered interest *subsisting in respect thereof at the time the transfer is registered*;

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(Emphasis added.)

Also s 216 of the NLC was referred as follows:

B (1) *Where, by virtue of sub-section (3) of section 215, any land is transferred subject to any* lease, *charge* or tenancy exempt from registration —

(a) *every provision, express or implied, of the* lease, *charge* or tenancy *shall, so long as the land continues vested in the transferee, be enforceable by or against him as if he were a party thereto*; and

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(b) unless the instrument of transfer otherwise provides, there shall be implied on the part of the transferee, and in favour of the transferor, an agreement with respect to those provisions in the terms set out in sub-section (2).

(2) The terms of the said agreement shall be as follows:

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(a) that the transferee will, so long as the land continues vested in him, duly perform and observe the said provisions;

(b) that the transferee will indemnify the transferor against all claims arising in respect thereof after the transfer takes effect, and all expenses properly

E incurred by the transferor in connection with any such claim.

In view of ss 215(3)(a) and 216 of the NLC, it was submitted that the second defendant is bound by the charges in favour of the plaintiff and the charges are enforceable against the second defendant. This is so even though prior to

F the Court of Appeal's order there was no relationship between the plaintiff and the second defendant. However, the second defendant had, subsequent to the Court of Appeal's order and registration thereof, held the 1/2 share in the said land subject to the charges and the charges are enforceable against him as if he is a party thereto.

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[10] That being the case, the plaintiff refuted the second defendant's contention that the affidavit in support contains fatal defects. As the charges are enforceable against the second defendant as if he is a party thereto, the plaintiff is entitled to demand for the sum owing from both defendants and

H thereafter to issue Form 16D to both defendants.

[11] The plaintiff also refuted the second defendant's contention that the plaintiff's interest is only on the 1/2 undivided share retained by the first defendant and not on the indefeasible 1/2 share of the second defendant's as

I being not only contrary to the clear letter of the Court of Appeal's order but also the provisions of ss 215 and 216 of the NLC. There is no issue of indefeasibility of title of the second defendant being challenged here as the plaintiff is not applying to set aside the transfer of the 1/2 share to the second defendant. All that the plaintiff is seeking to do is to enforce the charges in

the plaintiff's favour created by the first defendant, but enforceable against the first and second defendants.

THE SECOND DEFENDANT'S CASE

[12] It was submitted by learned counsel for the second defendant that once the second defendant was registered as the co-owner of the said land pursuant to the Court of Appeal's order, the second defendant has obtained indefeasible title under s 340 of the NLC. It is therefore possible to apply for the sale of the whole undivided share of the first defendant's without affecting the 1/2 share of the second defendant's. Reference was made to the writer Sihombing in her work *The National Land Code, A Commentary*, Vol 2, para 2255–2300 and quoted by learned counsel.

[13] It was also submitted that there has never been a relationship of chargee/chargor between the plaintiff and the second defendant to found a charge action.

[14] There are fatal defects in the affidavit in support (encl 3) when:

(a) in para 8, it is alleged that the first defendant and the second defendant failed to service the loan;

(b) in the plaintiff's exh 'NAAR-15' the plaintiff demanded 'the whole amount due and owing' when the second defendant owed the plaintiff nothing;

(c) in para 9, the deponent affirmed that the first defendant and the second defendant failed to remedy the breach stated in Form 16D, when the second defendant is not guilty of any breach;

(d) in the plaintiff's exh 'NAAR-16', Form 14D notice had falsely alleged that the second defendant is co chargor, which is not true.

EVALUATION AND DECISION

[15] After considering the submissions for both the plaintiff and the second defendant, I allow the plaintiff's application with *no order as to costs*. I do so for the following reasons.

(a) I agree with the submissions of learned counsel for the plaintiff in regard to the effect of the Court of Appeal's order vis the plaintiff's charges, which remain unaffected by the transfer of the 1/2 share of the said land to the second defendant. In view of this, I also agree that the provisions of s 215(3)(a) and s 216 of the NLC apply to the second defendant and thus binding the second defendant to the said charges in

favour of the plaintiff and enforceable by the plaintiff against the second defendant. This is so even though there was no relationship between the plaintiff and the second defendant prior to the Court of Appeal's order. The second defendant cannot now complain that the Court of Appeal's order could not have this effect when it was clear that the said order never intended to change the plaintiff's position in regard to the said charges executed by the first defendant. The provisions of ss 215(3)(a) and 216 of the NLC must necessarily be given effect to by this court;

(b) Moreover I am precluded from 'interpreting' the Court of Appeal's order so as to affect the plaintiff's interests in the charges. See *Sri Alam Sdn Bhd v Newacres Sdn Bhd* [1997] 1 MLJ 297; [1997] 3 CLJ 640;

(c) It therefore follows that by virtue of s 216 of the NLC, every provision of the charges are enforceable against the second defendant as if the second defendant is a party to the charges and has stepped into the shoes of the first defendant in regard to second defendant's 1/2 share of the said land. The plaintiff is entitled to demand for the sum owing not only from the first defendant, but also the second defendant and to issue the Form 16D to both of them as if the second defendant had failed to make good the sums secured under the charges;

(d) I disagree with the ingenuous argument of learned counsel for the second defendant when he argued that it is possible to apply for the sale of the 'whole undivided' first defendant's 1/2 share of the said land without affecting the 1/2 share of the second defendant's. His quotation from Sihombing's work on the National Land Code does not support his argument as her comments were pertaining to s 270 of the NLC. The phrase 'and to the whole of any undivided share in ... any such land' in s 256 of the NLC means exactly that — the whole of the said land as the said land has not been divided even though held equally 1/2 share by the first and second defendants.

(e) In view of the Court of Appeal's order, the issue of indefeasibility of the charges in favour of the plaintiff is not in issue before me as I am precluded from reconsidering the issue. In any case, I agree with the submission of learned counsel for the plaintiff that even assuming the transfer of the 1/2 share to the first defendant is defeasible under s 340(2) of the NLC, the interest of the plaintiff, being a bona fide subsequent party is indefeasible by virtue of the proviso to s 340(3). The facts in the Federal Court case of *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269 is distinguished from this case.

(f) I agree with the submission of the plaintiff's learned counsel that whether the relatives of the second defendant are still occupying the second defendant's 1/2 share of the said land does not constitute 'cause to the contrary'. As stated by Lord Oliver of Aylmerton (delivering the

judgment of the board) in the Privy Council case of *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457 at p 460, paras A-C, left:

> ... Section 256(3) of the National Land Code is mandatory. The court 'shall' order a sale unless it is satisfied of the existence of 'cause to the contrary'. Granted these words have been construed in Malaysia as justifying the withholding of an order where to make one would be contrary to some rule of law or equity, they clearly cannot extend to enabling the court to refuse relief simply because it feels sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly.

Plaintiff's application allowed with no order as to costs.

Reported by Kanesh Sundrum